

1725538 (Migration) [2019] AATA 6442 (8 November 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1725538

MEMBER: Russell Matheson

DATE: 8 November 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 08 November 2019 at 8:13am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – compelling reasons to waive Schedule 3 criteria – allegations of contrived marriage and paying the sponsor – genuineness of the relationship – fear of harm – decision under review affirmed

LEGISLATION

Migration Act 1958, s 65

Migration Regulations 1994, Schedule 2, cl 820.211; Schedule 3

CASES

Babicci v MIMIA (2005) 141 FCR 285

MZYPZ v MIAC [2012] FCA 478

Waensila v MIBP [2016] FCAFC 32

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant is a national of Nigeria, born in [year]. The applicant applied for the visa on 13 May 2017 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(ii) because the applicant did not meet the Schedule 3 criteria (3001) and there were no compelling circumstances to waive that requirement. The applicant seeks review of the delegate's decision.
4. The applicant appeared before the Tribunal on 29 October 2019 to give evidence and present arguments. The sponsor did not attend the hearing due to illness.
5. The applicant was represented in relation to the review by her registered migration agent.
6. For the following reasons, the Tribunal has concluded that the **decision under review should be affirmed**.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in this case is whether the applicant meets the Schedule 3 criteria (as attached to this decision), and if not, whether there are compelling reasons for not applying them.
8. The Tribunal has before it the applicant's file from the Department of Immigration (the Department); its own file; and a copy of the Department's decision provided by the applicant to the Tribunal.
9. The evidence the applicant provided at the Tribunal hearing is recorded throughout this decision record.
10. **Hearing**
11. At the beginning of the Tribunal hearing the Tribunal told the applicant that certain information in the Department file is the subject of an s.376 certificate. The Tribunal told the applicant it has considered the certificate and finds that the certificate is valid.
12. The Tribunal told the applicant the certificate prevents the Tribunal disclosing any document, matter or information referred to in the certificate as it would be contrary to the public interest because it may:
 - (a) Disclose, or enable a person to ascertain the existence or identity of, a confidential source of information.

13. The Tribunal also told the applicant that disclosure of the identified material is subject to the Tribunal's discretion. The Tribunal told the applicant that it had considered the information that is the subject of the certificate and is of the view that as the information is relevant to this case and relates to an allegation that the applicant and sponsor have entered into a contrived marriage, the source of the information expects anonymity. The Tribunal considers the information the subject of the s.376 certificate relevant to this review.
14. The Tribunal told the applicant that other information relevant to the application under review will be put to the applicant in accordance with s.359AA of the Act. The Tribunal further stated that the source of the information was received by the Border Watch Allegations and Referral Team via web form [in] April 2019 and was contained at folio 78 of Department file [number].
15. The Tribunal provided a copy of the certificate to the applicant and asked the applicant if she wished to comment on or respond to the validity of the s.376 certificate. The applicant said that she did not understand and made no further comment.
16. In accordance with s.359AA the Tribunal put to the applicant the information subject to the s.376 certificate that it would consider to be the reason or part of the reason for affirming the decision. The Tribunal explained the relevance and the consequences of the information and invited the applicant to comment on or respond to the information. The Tribunal also told the applicant that she could respond to that information orally or in writing or she could seek additional time to comment on or respond to it.
17. The Tribunal told the applicant the information contained at folio 78 in the Department's file alleges that:
 - The applicant had entered into a contrived marriage and had paid the sponsor \$[amount] to sponsor her application;
 - The applicant and sponsor have never lived together;
 - The parties opened a joint bank account to make their relationship look legitimate; and
 - The applicant was in a relationship with another person (named).
18. The applicant responded orally that she had not entered in a contrived marriage with the sponsor and that she had not paid him any money and that she was in an exclusive and genuine relationship with the sponsor and no other person.
19. There is no other evidence before the Tribunal to indicate the applicant entered into a contrived marriage with the sponsor and the Tribunal places no weight upon the anonymous allegation that is the subject of the s.376 certificate. The Tribunal informed the applicant of its decision not to place any weight on the allegation at the hearing.

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

20. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
21. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant

satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

22. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
23. The primary decision record indicates that the applicant entered Australia in October 2015 on a [temporary visa] which ceased on 27 January 2016. The applicant lodged her partner visa application on 13 May 2017.
24. The Tribunal finds, having regard to that information, that the last day the applicant held a substantive visa was when her [temporary] visa expired on 27 January 2016. The Tribunal finds that the applicant was not a holder of a substantive visa at the time she made the application for the Partner visa in May 2017. There is nothing to suggest that the applicant entered Australia as a holder of a Subclass 995 (Diplomatic) visa or as a special purpose visa holder.
25. The Tribunal is not satisfied the applicant meets cl.820.211(2)(d)(i). The applicant is required to satisfy the Schedule 3 criterion 3001 for the purpose of cl. 820.211(2)(d)(ii).
26. There is nothing before the Tribunal to indicate that the applicant held an entry permit that was valid up to and including 31 August 1994. There is nothing to indicate that the applicant became an illegal entrant before 1 September 1994. There is nothing to indicate that the applicant ceased to hold a criminal justice visa on or after 1 September 1994 or that he entered Australia unlawfully on or after 1 September 1994. There is nothing to suggest that the last substantive visa held by the applicant was cancelled and the Tribunal has made a decision to set aside and substitute the cancellation decision.
27. The Tribunal has found that the applicant ceased to hold a substantive visa when her [temporary] visa expired in January 2016. The Tribunal finds that date is the 'relevant day' within the meaning of criterion 3001(2)(c)(i) of Schedule 3. As her application for the Partner visa was made in May 2017, the Tribunal is not satisfied that the application was validly made within 28 days after the relevant day.
28. As the partner visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

Compelling reasons

29. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
30. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria

can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.

31. The Tribunal invited the applicant to present compelling reasons for not applying the criteria. The Tribunal has considered the applicant's evidence concerning the compelling circumstances in his case.
32. The applicant sponsor provided a written submission (TF folios 69-73) to the Tribunal from her representative addressing the Schedule 3 waiver. The applicant provided documentary evidence to the Tribunal that included:
 - A joint bank account statement;
 - Life insurance policy;
 - Joint lease;
 - Evidence of joint payment of utilities;
 - Evidence of correspondence to common address;
 - Two Form 888 statutory declarations;
 - Statutory declaration from the applicant;
 - Medical certificates/documents;
 - A police report and invitation;
 - Letter from the applicant's father;
 - Evidence of joint travel;
 - Photographs;
 - An Australian marriage certificate;
 - A Nigerian marriage certificate and dowry payment records;
 - Evidence of interstate travel to visit the sponsor; and.
 - Letter from Fair Trading.
33. The applicant in her migration to Australia application states that she first met the sponsor in July 2016 and the parties married in February 2017. The applicant gave evidence to the Tribunal that she has been in a genuine and continuing relationship with the sponsor during the course of the relationship and the genuineness of the relationship provides compelling reasons to waive the Schedule 3 criteria. The parties provided a copy of their marriage certificate to the Department and Tribunal. The Tribunal accepts that the parties have been married since [February] 2017. The Tribunal acknowledges the applicant's claims and has considered the various documents he has provided in support of the claim that the relationship is a genuine one. However, the Tribunal makes no assessment as to the nature of the applicant's relationship with the sponsor and has accepted at face value the claims made by the parties that they were and continue to be

in a genuine relationship together and the circumstances of that claimed relationship for the purposes of this decision.

34. The Tribunal notes the claim of the applicant to be in a genuine relationship and the documents provided as evidence are supportive of their claim. The Tribunal notes that the criteria in cl.820.211(2)(a) requires that the applicant is the spouse or de facto partner of the sponsoring partner. This, in part, requires the applicant and the sponsor to be in a genuine, continuing and exclusive relationship. If an applicant does not hold a substantive visa and does not meet the Schedule 3 criteria, the requirement in cl.820.211(2)(d)(ii) to provide compelling reasons for not applying those criteria is in addition to the criteria in cl.820.211(2)(a). Accordingly, in the circumstances of this case, the Tribunal does not consider the existence of a genuine and continuing relationship a compelling reason for not applying the Schedule 3 criteria as it is already a criteria which must be satisfied in order to meet the criteria in cl.820.211(2)(a). In the circumstances of this particular case the relationship of itself does not appear to be a compelling reason not to apply the Schedule 3 criteria; however, particular circumstances of the relationship may nonetheless be relevant to waiver.
35. While a genuine spousal relationship is considered the basic requirement for a partner visa application, the Tribunal accepts that a genuine relationship could be a compelling reason for not applying the Schedule 3 criteria. However, the Tribunal in this case is not satisfied when considering all the circumstances of this couple, that the genuineness, mutual commitment, emotional support, continuing nature and longevity of the parties' relationship or the parties' temporary separation are, on their own, circumstances that should compel the Tribunal to not apply the Schedule 3 criteria.
36. The applicant gave evidence that she wants to become a mother and have children with the sponsor and raise a family in Australia. The applicant in her written submission and oral evidence states that she had a miscarriage in 2017 and is currently undergoing testing in order to determine the best treatment and diagnose any possible reasons for the lack of success in falling pregnant. The applicant further stated that she is [age] years old and it is getting late in life for her to have children. The applicant stated that if she had to apply for her partner visa offshore she would be missing out on discovering and treating her fertility problems and the chances of her conceiving a child are significantly diminished. She further submits that the parties need to be in the same location for treatment to occur. The applicant stated in her submission that applying for her visa offshore interrupts her physical relationship with the sponsor and would cause emotional hardship. The Tribunal accepts that there would be a degree of emotional hardship and the parties would be separated temporarily. There is little evidence before the Tribunal to establish the degree of emotional hardship the parties would endure. The Tribunal accepts the parties may not want to be separated for any extended period of time, and they want to start a family and the applicant wants to continue to seek treatment for her fertility problems with a view to giving birth. The Tribunal accepts the applicant's treatment could be interrupted but also notes that she has sought pre-pregnancy counselling from her doctor [in] July 2019(TF folio 67) and fertility tests [in] October 2019. The Tribunal is of the view that the applicant is of a reasonably young age and is in the initial stages of tests in regard to her fertility in an attempt to conceive and that temporary separation would not have an adverse impact on her ability to seek treatment such as IVF to become pregnant in the future and there is no evidence before the Tribunal that the sponsor cannot travel to Nigeria to assist the applicant with the process. There is no evidence before the Tribunal that the applicant could not source similar treatment in Nigeria in relation to her fertility concerns. A search of the internet ([Https://nigerian IVF Centres in Nigeria](https://nigerian IVF Centres in Nigeria)) reveals many IVF clinics now operate in Nigeria today and states:

37. Many IVF clinics now operate in Nigeria today. They all serve one purpose and that is to help married couples who unable to produce babies. They can help these couples to become parents by helping the woman get pregnant.

38. The Tribunal is not satisfied temporary separation and the applicant wanting to seek treatment to conceive and give birth in Australia are circumstances that should compel the Tribunal to not apply the Schedule 3 criteria.
39. The applicant in her written submission and statutory declaration and oral evidence states that she cannot return to Nigeria in order to submit an offshore visa application because her life would be at risk and she has fears for her safety. She further states that her cousin who lived next door to her in Nigeria was killed as a result of a household fire due to a fuel explosion in [2014]. The applicant gave evidence that the evening of the fire she had an argument with her cousin and was arrested as a suspect for arson and later murder by the police after her cousin's brothers made accusations against her to the police. The applicant stated that after the police investigations and several weeks in jail she was found not guilty of murder and released. The applicant states that after being released from jail her cousin's brothers continued to blame her for their sister's death and they had assaulted her and thrown stones at her and attempted to throw petrol on her and set her alight. She further stated that her cousin's brothers have threatened to kill her if she returns to Nigeria. The applicant provided evidence that the police and village elders had determined her cousin had died as the result of a terrible accident and that they found her not guilty but her cousin's brothers did not accept this and she fled fearing for her safety from her village to live with her [relative] in [location], Nigeria. The applicant further states that the police in Nigeria see her matter as a family dispute and do not have the resources to protect her if she had to return and her clan elders were not able to protect her before she left her village to live with her [relative].
40. In determining the applicant's claims the Tribunal considered the following country information:
41. Law enforcement services in Nigeria are provided principally by the Nigeria Police Force. With strength of more than 350,000 men and women, this federal police force covers all thirty-six Nigerian states and the federal capital territory, Abuja.⁶ The police report to the inspector general of police, who is appointed by the president. The police are responsible for law enforcement operations, and an assistant inspector general commands each state police unit. The constitution prohibits state and local governments from organising their own police forces, but state governors may direct federal police in local emergency actions.⁷
- The NPF [Nigerian Police Force] is divided into the administration, anti-fraud section, central criminal registry, special anti-robbery squad, x-squad, general investigation, special fraud unit, legal section, forensic science laboratory, interpol liaison, homicide, anti-human trafficking, special branch (criminal and special investigation bureau) and the force CID investigation Kaduna annex.⁸*
42. The Tribunal notes that the threats to the applicant derive from personal matters. The Tribunal accepts the applicant's personal perspectives of fear of harm from her relatives, for a crime she states she has been acquitted of by the authorities and her clan elders found her innocent and without guilt. The Tribunal is of the view that effective protection in general is likely to be available considering the country information available despite the applicant's perceived weaknesses in the police system. There is little evidence before the Tribunal to demonstrate that clan elders would not support the applicant given that they have found her not guilty of any offences and have also addressed the issue with the applicant's relatives. The Tribunal accepts that the applicant has her own fears for her safety if she had to return to Nigeria but there is no evidence before the Tribunal that she cannot obtain effective protection from law enforcement authorities in Nigeria and the issue with her relatives has

been resolved by clan elders. In the absence of any credible threat to the applicant or any objective evidence of danger to her in Nigeria, the Tribunal is not satisfied the applicant is in real danger of persecution in Nigeria as a result of her fear of harm from relatives. The Tribunal is not satisfied these matters give rise to compelling reasons for the waiver.

43. Having considered the applicant's circumstances singularly and cumulatively the Tribunal is not satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii).

44. **Conclusion**

45. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

46. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Russell Matheson
Member

47.

ATTACHMENT - Extract from Migration Regulations 1994

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:

- (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
- (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering

Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.